Filed 12/23/13 In re Murray CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re CHRISTOPHER MURRAY on Habeas Corpus.	B253237 (Super. Ct. No. KA074614)

ORIGINAL PROCEEDING. Petition for a writ of habeas corpus. Bruce F. Marrs, Judge. Petition granted. Judgment reversed, in part, and remanded.[1]

Sharon Fleming, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Larry Daniels and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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[1] As explained below, this proceeding began as an appeal (case No. B223024). We then treated a motion to recall the remittitur as a habeas petition, which we now grant under a new case number.

Christopher Murray filed a petition for writ of habeas corpus, challenging as unconstitutional the life without parole sentence he received after being convicted of homicide offenses he committed when he was a juvenile. We issued an order to show cause why that sentence should not be reversed. We grant the petition and reverse the judgment so the trial court can resentence Murray in accord with the principles enunciated in *Miller v. Alabama* (2012) 567 U.S. ___, 132 S.Ct. 2455 (*Miller*).

FACTS AND PROCEDURAL HISTORY[2]

On April 3, 2006, Christopher Murray shot and killed Christopher Trevizo and Demetries Flores, and shot at but missed Flores's brother Damon. Accompanying Murray were Angelo Vasquez and Salvador Villanueva, who pointed guns at each of the Flores brothers, but fired no shots. Murray was angry at Trevizo because Trevizo stole marijuana from Murray at gunpoint a few months earlier. Murray and his companions confronted Trevizo and the Flores brothers after following them as they walked along a secluded wash.

Murray entered an open plea of no contest to the first degree murders of Trevizo and Demetries Flores, and to the attempted murder of Damon Flores, subject to a trial on the issue of whether he was insane when the crimes occurred. After the jury found Murray had been sane, the trial court imposed the following sentence: As to each of the two murder counts, life without parole (LWOP) (Pen. Code, § 190.5, subd. (b)), plus another 25 years to life for a firearm use enhancement (Pen. Code, § 12022.53, subd. (d)); as to the attempted murder count, the upper term of nine years (Pen. Code, § 664, subd. (a)), plus 20 years for another firearm use enhancement (Pen. Code, § 12022.53, subd. (c)).[3] Each term was consecutive to the others.[4]

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[2] Our statement of facts is taken in large part from the second of our two previous decisions in this matter, *People v. Murray* (Feb. 6, 2012, B223024) [nonpub.opn.] (*Murray II*).

[3] All further undesignated section references are to the Penal Code.

Murray appealed. We rejected his claim that the trial court should have excused a juror for harboring prejudice against the sanity defense, and that his trial lawyer was ineffective for failing to challenge that juror. We reversed and remanded for re-sentencing because multiple murder special circumstances (§ 190.2, subd. (a)(3)) had been improperly imposed for each murder conviction (*People v. Danks* (2004) 32 Cal.4th 269, 315), and because it was unclear whether the trial court had exercised its discretion under section 190.5, subdivision (b) in choosing life without parole for the murder counts instead of sentences of 25 years to life. (*People v. Murray* (May 11, 2009, B20344) [nonpub. opn.] (*Murray I*).)

On remand for re-sentencing, the trial court struck the second special murder circumstance. It re-sentenced Murray to: life without parole on the first murder count, with a consecutive 25 years for the gun use enhancement; a consecutive term of 25 years to life on the second murder count, plus another consecutive 25 years for the gun use enhancement; and the consecutive high term of 9 years for the attempted murder count, plus another consecutive 20 years for the other gun use enhancement.

Murray appealed again, contending that because he was a minor when the crimes occurred, the LWOP sentence for one murder count violated his state and federal constitutional protections against cruel and unusual punishment. He also contended that even if the LWOP were reduced to a term of 25 years to life, he would still face a de facto sentence of life without parole that is constitutionally prohibited.[5]

We affirmed the judgment, holding that under the then-current state of the law LWOP sentences were constitutional for minors convicted as adults of murder. (*Murray II, supra*.) In June 2012 the United States Supreme Court issued its decision in *Miller, supra,* 132 S.Ct. 2455, which held that the Eighth Amendment to the United States

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4 Vasquez and Villanueva were convicted as aiders and abettors of the murders of Trevizo and Demetries Flores, and of the attempted murder of Damon Flores, and we affirmed those judgments. (*People v. Vasquez* (May 6, 2010, B205698) [nonpub. opn.].)

5 Murray's second appeal raised several other grounds, which we rejected and which are not at issue here.

Constitution prohibits a sentencing scheme that mandates imposition of an LWOP sentence on a juvenile convicted of murder. (*Id.* at p. 2649.)

In response to the *Miller* decision, Murray filed a document styled as a "REQUEST TO RECALL THE REMITTITUR OR FOR WRIT OF HABEAS CORPUS," asking that we now declare the LWOP sentence unconstitutional because he was sentenced under a statute that did not comply with *Miller*, and remand for a new sentencing hearing. Respondent contended that we could not recall the remittitur, but agreed we had discretion to treat Murray's brief as a petition for a writ of habeas corpus. We issued an Order to Show Cause why such a writ should not be granted.

DISCUSSION

1. *The Evolving Case Law Regarding Punishment of Juvenile Offenders*

In *Graham v. Florida* (2010) 560 U.S. 48, 63-64, 81-82 (*Graham*), the United States Supreme Court announced a categorical rule prohibiting no-parole life sentences for minors who were convicted of non-homicide offenses. *Graham's* holding was based on the following: (1) scientific studies showing fundamental differences between the brains of juveniles and adults; (2) a juvenile's capacity for change as he matures, which shows that his crimes are less likely the result of an inalterably depraved character; (3) the notion that it is morally misguided to equate a minor's failings with those of an adult; and (4) the fact that even though non-homicide crimes may have devastating effects, they are cannot be compared to murder in terms of severity and irrevocability. (*Id.* at pp. 67-70.)

In *Miller, supra,* 132 S.Ct. 2455, the Supreme Court held that sentencing schemes that made LWOP sentences mandatory for juveniles who commit homicide offenses violated the Eighth Amendment's ban on cruel and unusual punishment. Under *Miller,* LWOP sentences are still permissible, but may be imposed on only the "rare juvenile offender whose crime reflects irreparable corruption." (*Id.* at p. 2469, citations omitted.) This determination must be made as part of a sentencing scheme that requires trial courts

to take into account the "distinctive (and transitory) mental traits and environmental vulnerabilities" of children. (*Id.* at p. 2465.)

Mandatory LWOP sentences for juveniles "preclude[] consideration of [their] chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds [them] – and from which [they] cannot usually extricate [themselves] – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of [their] participation in the conduct and the way familial and peer pressures may have affected [them]. Indeed, it ignores that [they] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, [their] inability to deal with police officers or prosecutors (including on a plea agreement) or [their] incapacity to assist [their] own attorneys." (*Miller, supra,* 132 S.Ct. at p. 2468.) Accordingly, trial court sentencing of juvenile homicide offenders must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 2469.)

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court applied *Graham* to non-homicide juvenile offenders who receive a sentence which, although subject to the possibility of parole, is so long that it amounts to a de facto LWOP sentence.

2. *Remand Is Appropriate For Resentencing*

Murray's LWOP sentence was authorized by section 190.5, subdivision (b). Under that statute, juveniles between the ages of 16 and 17 who are convicted of first degree murder and as to whom certain special circumstances are found to exist "shall be confine[d] in the state prison for [LWOP] or, *at the discretion of the court, 25 years to life.*" (Italics added.) LWOP is considered the presumptive punishment in such cases, with the trial court having discretion to impose the lesser penalty along with the

availability of parole if later found appropriate. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.)

Murray contends that section 190.5 does not satisfy *Miller* because it does not require the trial court to take into account the several youth-related factors deemed important by the *Miller* court and because section 190.5 elevates LWOP to the presumptive sentencing choice, placing the trial court's discretion to impose a lesser, parole-eligible sentence on an unequal footing. He also contends that *Caballero's* ban on de facto LWOP sentences for juveniles convicted of nonhomicide offenses applies here, calling *Miller* into play in regard to his non-LWOP sentence on the attempted murder count as well as the total length of any new sentence imposed in light of *Miller*.

Respondent contends that section 190.5 satisfies *Miller* because it does not make LWOP mandatory but instead gives the trial court discretion to impose the lesser, parole-eligible sentence. Respondent also contends that any flaws in section 190.5 were eliminated by a new law with retroactive effect that will allow juvenile homicide offenders like Murray to seek parole after serving 15 years of their sentence. (§ 1170, subd. (d)(2).)[6] According to respondent, *Caballero's* ban on de facto LWOP sentences does not apply because the only issue in *Caballero* was the length of sentences for juveniles convicted of nonhomicide offenses.

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6 Murray contends that the post-conviction parole procedure established by section 1170, subdivision (d)(2) is inadequate for several reasons. First, it predates *Miller* and was not designed to fill the gaps that the *Miller* decision exposed. Second, such legislation is always subject to amendment or repeal. We agree.

We recognize that the new law does allow for consideration of some factors that sound like those endorsed in *Miller*: the defendant had insufficient adult support or supervision or suffered from physical or psychological trauma (§ 1170, subd. (d)(2)(F)(iv)); or the defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that do not constitute a defense but did play a part in the crime (§ 1170, subd. (d)(2)(F)(v)).

However, the law says nothing about the factors particular to juveniles that animated *Miller*. Moreover, there are limitations to availability of relief under the statute (§ 1170, subd. (d)(2)(F)(i)-(iii)) which effectively would preclude application of the *Miller* factors in certain juvenile cases.

Our Courts of Appeal have split on the viability of section 190.5 in light of *Miller*, with three such cases currently before the California Supreme Court.[7] Because this issue remains unsettled we decline to resolve the issue here. Instead, we deem it appropriate to remand the matter to the trial court once more to resentence Murray in the first instance in light of *Miller*. As we held in *Murray II, supra*, the trial court here was aware of its discretion under section 190.5, but that hearing took place before *Miller* and through the presumptive choice lens of *People v. Ybarra*, *supra*, 166 Cal.App.4th at page 1089. We cannot say how the *Miller* factors might have affected the trial court's sentencing analysis, and express no opinion as to whether *Miller* compels a particular sentence in this case.[8]

DISPOSITION

The petition is granted. The judgment is reversed as to sentencing only and the matter is remanded for a new sentencing hearing that considers the factors set forth in *Miller, supra*, 132 S.Ct. 2455.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J. GRIMES, J.

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7 These are: *People v. Siackasorn*, review granted Mar. 20, 2013, S207973; *People v. Moffett*, review granted Jan. 3, 2013, S206771; and *People v. Gutierrez*, review granted Jan. 3, 2013, S206365.

8 Because we remand for resentencing, we do not address Murray's argument that the total length of his sentence might violate *Miller* if it is so long that it amounts to a de facto LWOP sentence. We note that the court in *People v. Ramirez* (2013) 219 Cal.App.4th 655, held that *Miller's* reasoning applied to de facto LWOP sentences, but a petition for review in that case is still pending.